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Supreme Court, U.S.
FILED
JUN 27 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CAMBRIDGE WIRE CLOTH COMPANY,
Petitioner,

v.

THE LAITRAM CORPORATION AND INTRALOX, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, The Laitram Corporation and Intralox, Inc. ("Laitram"), would have this Court believe that the unequivocal admission against interest of Mr. Lapeyre, Laitram's President and the co-patentee of Patent 3,870,141, that Claim 19 of '141 is completely anticipated by German Patent 113,669—Malard is irrelevant because the admission relates to a structure which was "assumed", "conjured up", "imaginary" and "hypothetical". Such characterization could not be further from the truth.

ARGUMENT IN REPLY TO THE OPPOSITION

A. Mr. Lapeyre's Admission Concerns an Embodiment Clearly Disclosed by Malard, Not One That Was Contrived

Malard illustrates in the drawings of his patent one embodiment of the invention. Although the illustra-

tions depict modules each having three link ends (called "projections b" by Malard) on one side of the module and two on the other, the Malard patent specifically describes alternatives to what the drawings show:

> "The number of these projections b can be chosen as desired and relates to the width and arrangement of the individual members."

Mr. Lapeyre was asked about an alternative embodiment having 100 link ends on each side. Such an embodiment unquestionably is contemplated by the language from the Malard patent just quoted. Indeed, even Mr. Lapeyre's *own* patent (which illustrates modules having as few as four link ends on each side) states:

> "Module 10 comprises a multiplicity of . . . link-like elements, for example, twenty-four *or one hundred twenty*." (Emphasis added)

These extracts from the record amply demonstrate that Mr. Lapeyre was *not* testifying about anything contrived when he unequivocally agreed that the non-illustrated embodiment disclosed by Malard contains each and every element recited in Claim 19 of '141.[1]

B. Mr. Lapeyre's Statement at Trial That He Had Never Seen Malard Is Contrary to the Record

Laitram seeks to diminish the significance of Mr. Lapeyre's admission by asserting that he had never seen Malard before testifying. Additionally, Laitram cites self-serving testimony by Mr. Lapeyre that he had been "tricked into saying yes to some questions."

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[1] Laitram concedes (opposition brief, at 2) that Mr.Lapeyre found correspondence between Claim 19 and the structure he was asked about.

The truth is that Mr. Lapeyre *had* been informed of Malard at least twice in letters from his counsel dated September 23, 1975 and September 1, 1977, both of record. Furthermore, Mr. Lapeyre was provided ample time at trial to study Malard. After doing so, he expressed his readiness to testify:

> "Q. . . . . [H]ave you looked sufficiently to answer questions about it?
>
> A. I'll know whether I've looked sufficiently when I hear the questions. So you can go ahead, Mr. Joyce."

C. Laitram's Citations to the Record Relate to the Illustrated Embodiment of Malard, Not the Alternative Embodiment Which Mr. Lapeyre Admitted Anticipates Claim 19

Sprinkled throughout Laitram's brief are references to trial record excerpts, most of which are contained in Appendix G to the brief.

A review of the cited excerpts quickly reveals that those relied upon as describing differences between Malard and Claim 19 are concerned only with the embodiment *illustrated* in Malard's drawings.[2] Nothing has been cited which would contradict the admission of Mr. Lapeyre that Malard's alternative, *non-illustrated* embodiment completely anticipates Claim 19. Thus, in seeking review by this Court, petitioner has not ignored testimony and trial exhibits adverse to its position, as Laitram asserts.

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[2] See Appendix G, at 9b-17b and 27b-34b (extracts of the testimony of trial witnesses), and at 20b-26b, 35b and 36b (colloquy involving the trial judge).

D. The Present Petition Involves an Issue Which Is a Linchpin to the Enforceability of All of Laitram's Asserted Patents

Laitram contends that since only one claim of one patent in suit is directly involved in this petition, the petition is of no practical or legal significance. This is not true.

Should the Court recognize that the trial court committed clear error in ignoring Mr. Lapeyre's admission that Claim 19 of '141 is completely anticipated, the enforceability of the entire '141 patent would be affected, for it is uncontroverted that the Malard patent was known to Laitram but never was brought to the Patent Office's attention. Thus, Laitram breached its uncompromising duty to cite to the Patent Examiner what Mr. Lapeyre conceded to be "certainly pertinent" prior art.

Furthermore, since it is uncontroverted that '141 is the dominant and cornerstone patent in suit and that Laitram attempted to suppress Malard from the trial court, the enforceability of the remaining closely-related patents in suit also would be affected. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240 (1933); *SSIH Equipment S.A.* v. *United States International Trade Commissioner*, 718 F.2d 365 (Fed. Cir. 1983). Thus, the issue before this Court is

of considerable legal and practical significance warranting grant of the petition.

Respectfully submitted,

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